Supreme Court
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No. 95-1676

In The Supreme Court Of The United States

OCTOBER TERM 1995

CHARLES PETTUS,

Petitioner,

v.

I.T.O. CORPORATION OF VIRGINIA,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Intervenor/Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a bare and unsupported letter from Petitioner's counsel containing nothing more than the statement "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]" constitute a valid request for modification of an existing compensation order pursuant to 33 U.S.C. § 922?

PARTIES TO THE PROCEEDING

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(Continued on next page)

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PARTIES TO THE PROCEEDING

(Continued from previous page)

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[2] The Director, Office of Workers' Compensation Programs, was dismissed as a party respondent by Court of Appeals for the Fourth Circuit. The Director was subsequently allowed to intervene and was required by the court to be aligned with the Petitioner. The Director is shown as a Respondent in the Petition for Writ of Certiorari only because of the requirements of Supreme Court Rule 12.6. Respondent, I.T.O. Corporation of Virginia, asserts that the Director is not a proper party to these proceedings, based on this Honorable Court's decision in Director, OWCP v. Newport News Shipbuilding & Drydock Co., 115 S. Ct. 1278 (1995). The Director has not filed a timely response supporting the Petition as required by Rule 12.6. Therefore, Respondent, I.T.O. Corporation of Virginia, suggests that the Director should no longer be listed as a party to these proceedings.

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No. 95-1676

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES PETTUS,

Petitioner,

v.

I.T.O. CORPORATION OF VIRGINIA,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Intevenor/Respondent.

BRIEF IN OPPOSITION

Respondent, I.T.O. Corporation of Virginia, respectfully requests that this Honorable Court deny the

petition for writ of *certiorari* which seeks review of the Fourth Circuit Court of Appeals opinion below. That opinion is reported at 73 F.3d 523 and is reprinted in the petition for *certiorari* at Appendix ("App.") A.

OPINIONS BELOW

The Opinions Below were correctly set forth in the Petition for Writ of *Certiorari*.

STATEMENT OF JURISDICTION

The Petition for Writ of *Certiorari* correctly presented the Statement of Jurisdiction.

STATUTORY PROVISIONS

In addition to the statutory provisions contained in the Petition for Writ of *Certiorari*, Respondent includes the following.

33 U.S.C. § 919(b)
Procedure in respect of claims

(b) Notice of claim. Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the commission [Secretary of Labor], shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

33 U.S.C. § 919(c)
Procedure in respect of claims

(c) Investigations; order for hearing; notice; rejection or award. The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other

interested parties at least ten days notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

STATEMENT OF THE CASE

The Petitioner, Charles Pettus, asserted claims under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.* (the "Act" or "LHWCA") as a result of injuries sustained during the course of his employment as a longshoreman with Respondent, I.T.O. Corporation of Virginia ("I.T.O." or the "Employer").

On September 22, 1987, Petitioner injured his right knee which resulted in a period of temporary total disability from September 23, 1987 through January 31,

1988. Compensation benefits were voluntarily paid by the Employer under Office of the Workers' Compensation Programs ("OWCP") Claim No. 5-63104. Petitioner re-injured his right knee on February 1, 1988. This re-injury resulted in a period of temporary total disability from March 28 through July 31, 1988. The Employer again voluntarily paid compensation benefits, this time under OWCP No. 5-64541.

Subsequently, a dispute arose between Petitioner and the Employer concerning the extent of Petitioner's residual permanent disability of the right knee. By letter dated June 1, 1989, Petitioner, by counsel, made claim for disability benefits pursuant to the provisions of the LHWCA and requested an informal conference on the issue of permanent partial disability. A dispute also arose concerning Petitioner's entitlement to additional

temporary total disability benefits for the period from August 1 through September 6, 1988.

Petitioner and the Employer eventually resolved all differences regarding disability benefits and entered into stipulations agreements as to both injuries. Thus, no formal hearing was held. Pursuant to the stipulation agreements, the District Director entered compensation orders for both claims on August 23, 1989. The Employer made timely payment of all compensation benefits according to the parties' stipulations and the District Director's Orders. The last compensation payment to Petitioner was made on August 28, 1989.

On September 6, 1989, Petitioner's counsel sent letters to the OWCP referencing the OWCP file numbers 5-63104 and 5-64541 which stated,

> [p]lease be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the

> Longshore & Harbor Workers'
> Compensation Act.

(App. A, B.) Neither counsel nor the OWCP sent copies of these letters to the Employer or its counsel.

The parties reached an agreement, on November 3, 1989, regarding Petitioner's attorney's previously filed fee petition. Accordingly, the District Director, on November 27, 1989, entered an Attorney Fee Order.

On December 13, 1989, Petitioner's counsel again sent a letter to the OWCP referencing OWCP file numbers 5-63104 and 5-64541 which stated,

> [p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the The [sic] Longshore & Harbor Workers' Compensation Act.

(App. C.) Once more, the Employer did not receive copies of this letter--either from counsel or the OWCP.

On January 10, 1991, Petitioner's counsel sent a letter (App. D) to the District Director enclosing a copy of a "Not fit for duty" slip from Petitioner's authorized treating physician, Dr. Morales, dated November 14, 1990. This slip was for the period of October 3 through October 17, 1989. Counsel's letter requested a conference on the issue of temporary total disability for that period. The Employer maintained that Petitioner was not entitled to any additional compensation because the request was not filed within the time constraints set forth in § 22 of the Act.

On January 29, 1992, Administrative Law Judge Malamphy issued his Decision and Order. He found that Petitioner's attorney's letter of December 13, 1989 was a

> bare assertion of a claim under the Act, unsupported by any foundation, submitted by Claimant's counsel immediately after Orders are entered with the intent to

> avoid or negate the one-year statute of limitations of Section 22.

(Petitioner's App. C at XXXVII.) Accordingly, Administrative Law Judge Malamphy denied the claim for compensation for disability benefits for the period of October 3, 1989 to October 17, 1989. (Petitioner's App. C.)

Petitioner timely noted, on February 5, 1992, his appeal of Administrative Law Judge Malamphy's decision to the Board. By Decision and Order dated June 13, 1994, the Board reversed Administrative Law Judge Malamphy's factual finding and held that

> claimant's letter dated December 13, 1989, to the district director constituted a valid request for modification.

(Petitioner's App. B at XXIII.) The Board then reversed Administrative Law Judge Malamphy's denial of benefits and held that Petitioner was entitled to temporary total disability benefits for the period of

October 3, 1989 to October 17, 1989. (Petitioner's App. B.)

The Employer filed a Motion for Reconsideration with the Board on July 12, 1994. This Motion was denied by the Board on February 17, 1995.

On March 14, 1995, the Employer timely filed its petition for review with the Fourth Circuit Court of Appeals. By Opinion dated January 16, 1996, the Court of Appeals reversed the decision of the Benefits Review Board and remanded the case with directions to deny the compensation claim. (Petitioner's App. A.)

In reaching its decision, the Court noted that the application for modification by a party in interest is only the first step of the review process whose various steps and time limitations are statutorily mandated. In this case, neither of Petitioner's "threadbare letters" (Petitioner's App. A. at XI) induced the District

Director to undertake the notification of the employer or any investigation, conference, or hearing as required by § 19 of the Act. *See* 33 U.S.C. § 919(b), (c).

The Court acknowledged that a claimant's request for modification need not meet any particular form, but found that "there must be some basis for a reasonable person to conclude that a modification request has been made." (Petitioner's App. A at XI.) Because Petitioner's letters

> made no reference to any change in [his] condition, to a mistake of fact in the earlier order, to additional evidence concerning [his] disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification

(*Id.* at XI-XII) the Court concluded Petitioner's letters were too "too sparse to meet even this most lenient of standards" (*Id.* at XI) because they failed to indicate any actual intention on the part of Petitioner to seek

compensation for a particular loss, a factor the Court deemed critical in assessing the sufficiency of the letters.

On April 15, 1996, Petitioner timely filed his writ of *certiorari* with this Honorable Court.

REASONS TO DENY THE WRIT

I. The Fourth Circuit correctly held that Petitioner's letters were insufficient to constitute a request for modification under § 22 of the Act and its decision is in harmony with the decisions of other circuits.

Section 22 of the LHWCA, 33 U.S.C. § 922, provides the only means for changing otherwise final decisions and permits modification of a prior order, up to one year after the last payment of compensation or the rejection of a claim, where there has been a change in conditions or a mistake of fact. This section places a

strict one-year limit on the power of the district director[3] to review an existing compensation order. *See* Intercounty Construction Corp. v. Walter, 422 U.S. 1, 10 - 11 (1975).

There are no formal criteria for a request for modification, but the request must be in writing and indicate an intention to seek further compensation. Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545 (5th Cir. 1974). In determining whether a particular writing has indicated an intent to seek further compensation, the courts have considered whether the claimant expressed dissatisfaction with a decision which had been made or with an order which had been entered; whether the claimant asserted that a request for review

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[3] The statute still refers to the deputy commissioner. However, the title of the person performing these duties has been changed to "district director."

would be filed; whether the claimant raised the issues of the nature, degree, and duration of his disability; or whether the claimant expressed concern about additional physical or economic problems. *See Id.*; Candado Stevedoring Corp. v. Willard, 185 F.2d 232 (2nd Cir. 1950).

In arguing that his blanket assertions for "any and all benefits" are a valid request for modification, Petitioner relies upon Fireman's Fund and Candado Stevedoring. In doing so, he ignores the fact that his applications are distinguishable from those in the above-cited cases. In Fireman's Fund, the claimant's attorney called the deputy commissioner and notified the deputy commissioner that the claimant had received the statutory maximum for partial disability and would file an application for review of the claim on the ground that the claimant was permanently and totally disabled.

The deputy commissioner made a written memorandum of this call, which was deemed to be sufficient to constitute an application for modification under 33 U.S.C. § 922. Unlike the letters filed by Petitioner's counsel, this writing evinced an intention to seek review of the claimant's claim on the ground of change in conditions.

In Candado Stevedoring, the claimant filed a paper which he entitled "claim for compensation" seeking **further** compensation under the LHWCA. The Ninth Circuit Court of Appeals found that the title of a document was not controlling and determined it to be a proper application for review under § 22 of the Act. In contrast to the case at bar, the claimant's filing requested additional compensation. Further, the employer, in Candado Stevedoring, received notice of

the filing as required by § 19, which governs the procedure with respect to § 22 applications.

Petitioner also cites Consolidation Coal Co. v. Worrell, 27 F.3d 227 (6th Cir. 1994), National Mines Corp. v. Carroll, 64 F.3d 135 (3rd Cir. 1995), and Eifler v. O.W.C.P., 926 F.2d 663 (7th Cir. 1991) in support of his position that his threadbare letter was a valid request for modification and as evidence that the Fourth Circuit's decision is contrary to established law in other circuits. Petitioner's reading of these cases is erroneous. None of these cases endorsed bare-bones writings such as those submitted by Petitioner's counsel as adequate claims or requests for modification. Instead, the holdings stand for two broad principles long recognized by the courts, including the Fourth Circuit: (1) a party need not specifically state the grounds upon which he seeks a modification; and (2) a party must not

correctly entitle his filing for it to constitute a request for modification. All that is required is information sufficient from which one might reasonably infer a modification is sought.

Contrary to Petitioner's assertions, the Fourth Circuit Court of Appeals decision is in harmony with these cases. The Court is not mandating that the specific grounds upon which modification is sought be stated in the petition for review or even that a formal request for review be filed. Instead, the Court is requiring that the petition for review, however titled or presented, "contain some basis for a reasonable person to conclude that a modification request has been made" (Petitioner's App. A at XI) so that the process required under § 22 of the Act is initiated. Petitioner's threadbare letters clearly did not meet this lax standard

as evidenced by the fact that nothing occurred as a result of his filing these letters.

In deciding whether to reopen a case under § 22 of the Act, a court must balance the need for finality in decision making with the need to render justice. General Dynamics Corp. v. Director, OWCP, 673 F.2d 23 (1st Cir. 1982). It is obvious that the Act mandates and the courts intend that there be an identifiable date after which no action regarding a claim can be taken. *See* Strachan Shipping Co. v. Hollis, 460 F.2d 1108, *cert. denied sub nom.* Lewis v. Strachan Shipping Co., 409 U.S. 887 (1972) (the absence of a procedure for orderly conclusion of compensation cases is incompatible with a scheme of cooperation and voluntary payments by employers and insurers envisaged by the Act.)

Such will not be the case if Petitioner prevails and the overbroad language of his attorney's blanket

assertion is allowed to stand as a valid request for modification. The sole purpose of such an assertion, which is obviously protective and anticipatory in nature, is to leave the door open for some additional claim to be made years down the road, and thus, nullify the statutory limitations provisions provided by the Act. Under such an interpretation, no employer will ever be able to close a claim and know that all compensation benefits have been paid. If, buried in the Office of Workers' Compensation Programs file, there is a letter with the "any and all benefits" language written within a year of the date upon which compensation was last paid, the employer may, years into the future, be required to pay additional compensation benefits--even though the employer had no knowledge of the letter and even though the language of § 22 of the Act

specifically limits the time during which a modification may be requested.

It is clear that Congress intended there to be an end to compensation claims when it enacted § 22 of the Act. This Honorable Court has long recognized that statutes of limitation

> represent a pervasive legislative judgment . . . that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'

United States v. Kubrick, 444 U.S. 111, 117 (1979) (quoting Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)). Petitioner would negate these statutes of limitation through the use of letters which are unequivocally protective and anticipatory in nature. This must not be allowed.

II. There is no compelling reason to grant the writ.

Although Petitioner asserts otherwise, there simply is no important federal question to be addressed in this case. The Fourth Circuit's decision comports with decisions of this Honorable Court and of the other circuits. By finding Petitioner's counsel's protective "catch-all" filings to be inadequate to assert a request for modification under the Act, the Court acknowledged that all sections of the Act, including the procedural aspects which ensure due process, must be considered in determining what constitutes a proper request for modification. The Court's holding merely ensures that all sections of the Act are given the meaning the legislature intended and prevents Petitioner from avoiding or negating certain provisions of the Act.

There is no doubt that Petitioner's counsel's letters were meant to obviate the provisions of the Act.

As shown by his January 10, 1991 letter (App. D), counsel is quite capable of filing a straight-forward request for modification--when the grounds for such a request exists.

There is simply no need for this Honorable Court to expend its time defining what the statutory language makes clear.

Petitioner finally argues that this Honorable Court should consider this case because of the large number of longshoring cases arising in the Fourth Circuit. This Honorable Court's intervention is not required to rectify any "broad detrimental effect which will undermine the very purposes of the Longshore Act." (Petitioner's Brief at 23.) Petitioner's counsel's firm handles the majority of the cases arising under the LHWCA in Greater Hamptons Roads area. Counsel can avoid any detrimental effect by doing what the Act

requires and what he has demonstrated the ability to do--to file a request for modification that sets in motion the statutory review process--and to do so within the time limits prescribed by the Act.

CONCLUSION

Respondent respectfully submits that this case presents no issue of law or fact that justifies review by the United States Supreme Court. Petitioner's case has been properly reviewed before the Office of Administrative Law Judges, the Benefits Review Board and the Fourth Circuit Court of Appeals. Respondent respectfully submits that the decision of the Fourth Circuit is proper and that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

I.T. O. CORPORATION OF VIRGINIA

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